

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1487

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B p/s

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

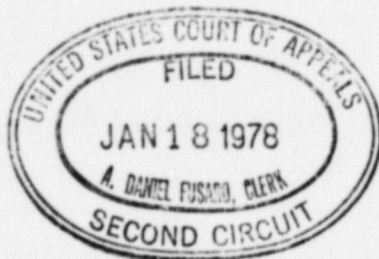
JOSE NUNEZ,

Defendant-Appellant.

Docket No. 77-1487

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



MARTIN ERDMANN,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

STEVEN LLOYD BARRETT,
Of Counsel.

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UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U. S. vs

JOSE NUNEZ

75 941

Yr. | Order

DATE	PROCEEDINGS (continued)	M. EXCLUDABLE
4/4/77	^(Document No. 1) Stenographers=transcript dated 1/16/76, 5/21/76 , 7/23/76, 11/11/76, and 11/18/76 filed.	LI 81
4/4/77	Record on appeal certified and hand delivered to the C of A by Jan Gill.	
4.5.77	Stenographer's Transcript dated February 6, 1976 filed.	
4-8-77	Acknowledgment received from the court of appeals for receipt of record on appeal	
4.11.77	Stenographer's Transcript dated May 7, 1976 filed.	
4-11-77	Voucher forwarded to the court of appeals for approval (Martin Goldberg, Esq)	
5-23-77	Transcript filed dated Dec. 19, 1975.	
5.27.77	Voucher For compensation for Expert Services filed and forwarded to Washington for Payment.	
6-29-77	Mandate received from the court of appeals filed affirming the judgment of this court (JN)	
7/8/77	File rec'd from C of A, acknowledgement mailed.jlj	
7.28.77	Certified Copy of Judgment and Commitment returned and filed from Marshal. Deft. delivered on 7.20.77 to M.C.C., New York.	
8/3/77	By Mishler, Ch J-Order releasing bail filed.jlj	
10-14-77	Notice of motion filed with Memo of Law for an order correcting the length of probation sentence imposed by reducing the term from 4 yrs to 2½ years. (forwarded to Pratt, J.)	
11-10-77	Mandate received from C. of A. denying deft's petition for Writ of Certiorari filed. a1	
11-15-77	Covts Memo of Law filed.	
11-18-77	By Pratt, J.- Memorandum and order dtd November 18, 1977 denying defendant's motion for correction of sentence Copies sent to parties.	
11/29/77	Notice of appeal from order denying Rule 35 motion filed	
11/29/77	Copy of docket sheet and notice of appeal mailed to court of appeals	
12-19-77	Scheduling order filed that the record on appeal be docketed on or before Dec. 27, 1977.	

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - x

UNITED STATES OF AMERICA,

Plaintiff,

DOCKET NO. 75 CR 948

- against -

MEMORANDUM AND ORDER

JOSE NUNEZ

Defendant.

- - - - - x

PRATT, J:

Defendant has moved pursuant to FRCrP 35 for correction of the sentence imposed by this court after conviction for a violation of 18 USC §472. Pursuant to 18 USC §3651, the defendant was sentenced to three years imprisonment, six months of which were to be served in a jail-type institution with the remainder of the sentence suspended. The court further ordered that upon completion of the jail term, the defendant was to be placed on probation for a period of four years.

Defendant argues that the imposed sentence is illegal since the four year period of probation exceeds the two and one-half month suspended portion of the three year sentence. He maintains that when ordering a "split sentence" under 18 USC §3651, a court must limit the term of probation to the length of the suspended portion of the sentence of incarceration.

The second paragraph of 18 USC §3651 provides that:

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best. (emph. supp.)

Contrary to defendant's argument, the plain language of the statute clearly indicates a congressional intent that the words "such period" relate to the subsequent words "as the court deems best," and not to the preceeding words, "the remainder of the sentence". Any possible doubt is removed by the identical language which Congress used in the first paragraph of §3651. Clearly, Congress intended in §3651 that if a court imposes probation, its length, as well as its terms and conditions (up to a maximum of five years), lie within the sentencing court's discretion.

For the foregoing reasons, as well as the others articulated in the government's memorandum of law in opposition to the motion, defendant's motion for correction of the sentence is denied.

SO ORDERED.

Dated: Westbury, New York
November 18, 1977.

A handwritten signature in cursive script, appearing to read "George C. Pratt", written over a horizontal line.

GEORGE C. PRATT
U. S. DISTRICT JUDGE

1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF NEW YORK

4 -----X
5 UNITED STATES OF AMERICA, :

6 Plaintiff, :

7 -against- :

No. 75 CR 943

8 JOSE NUNEZ, :

9 Defendant. ,

10 -----X
11 United States Court House
Westbury, New York

12 February 17, 1977
2:00 o'clock P.M.

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16 B e f o r e :

HONORABLE GEORGE C. PRATT, U.S.D.J.

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21
22
23 RAYMOND P. STALKER
Court Reporter
24
25

Appearances:

For the Government:

EDWARD THOMPSON, ESQ.

For the Defendant:

CHRIS TERMINI, ESQ.

1
2 THE CLERK: For sentencing, the United States of
3 America against Jose Nunez.

4 THE COURT: Mr. Nunez was found guilty by a jury
5 verdict on December 9, 1976. Is there any reason why
6 sentence should not be imposed at this time?

7 MR. TERMINI: No, Your Honor.

8 THE COURT: Mr. Nunez, is there any reason why
9 sentence should not be imposed at this time?

10 THE DEFENDANT: No.

11 THE COURT: Do you have anything you wish to say
12 on behalf of your client?

13 MR. TERMINI: Your Honor, Mr. Acen. was the trial
14 attorney in this case. He has since left the office
15 and I have inherited this matter. I've done the best
16 I could to refresh myself by records of the circum-
17 stances of this case.

18 I received the probation report and very briefly,
19 Your Honor, I know that has been analyzed critically
20 by the Court. It seems this man does have family
21 differences and is making an attempt to do something
22 with himself. He has a job which he just got, he
23 makes \$214 a week. He has had only one previous
24 in state court which resulted in a dismissal.

25 I would ask Your Honor, since you are most

1
2 familiar with the underlying facts, I ask Your Honor
3 to consider all the factors in rendering a sentence
4 in this case.

5 THE COURT: Mr. Nunez, is there anything you
6 wish to say in your own behalf?

7 THE DEFENDANT: Well, I think my lawyer said it.

8 THE COURT: All right. Based on the information
9 I have acquired through having presided at the trial
10 and what has been provided to me from the probation
11 department contained in the probation report and
12 other information brought to my attention, as well as
13 the recommendations of my conferring judges, my sen-
14 tence is as follows. Before I do that, Mr. Nunez,
15 how old are you?

16 THE DEFENDANT: I'm going to be 27.

17 THE COURT: On March 20th?

18 THE DEFENDANT: On March 20th.

19 THE COURT: My sentence is as follows:

20 Pursuant to 18 U.S. Code, Section 3651, it is
21 adjudged that the defendant is hereby committed to the
22 custody of the attorney general or his authorized
23 representative for imprisonment for a term of three
24 years and on condition that the defendant be confined
25 in a jail type treatment or institution for a period

1
2 of six months.

3 The execution of the remainder of the sentence
4 of imprisonment is hereby suspended and the defendant
5 is placed on probation for a period of four years, to
6 commence upon defendant's release from confinement.

7 MR. TERMINI: Judge, could I have the jail sen-
8 tence stayed for a week or two?

9 THE COURT: Well, first, I want to advise the
10 defendant that you have a right to appeal your con-
11 viction and if you are unable to afford the cost of an
12 appeal, you may apply for leave to appeal in forma
13 paupers. You have been represented by the Legal Aid
14 Society thus far and they will continue to represent
15 you unless other counsel is assigned in the event
16 that you do decide to take an appeal.

17 Has the question of appeal been considered?

18 MR. TERMINI: I just spoke to Mr. Nunez outside.
19 If I could have one brief second?

20 (Short pause.)

21 MR. TERMINI: I've spoken with Mr. Nunez and it
22 is his desire to go ahead with an appeal in this mat-
23 ter, Your Honor.

24 THE COURT: The minutes have not yet been trans-
25 cribed?

1
2 MR. TERMINI: I've looked at the minutes, there
3 was a daily situation. There are minutes in this
4 case through the actual testimony. I don't believe
5 anything passed the testimony was transcribed. But,
6 I have the minutes of the suppression hearing as well
7 as the testimony of the varying witnesses, I believe
8 up until the point where summations would begin.

9 THE COURT: All right, to the extent that min-
10 utes are needed they will be transcribed at the ex-
11 pense of the government pursuant to CJA. I'll stay
12 execution for one week. If a notice of appeal is
13 filed within that time, I will stay the execution of
14 the sentence until a determination of the appeal.

15 MR. TERMINI: I do have an appeal--an appeal
16 form which I intend to fill out right now, Judge.

17 THE COURT: File it before you leave today and
18 there will be no problem. Anything further?

19 MR. TERMINI: Thank you very much, Your Honor.

20 MR. THOMPSON: Thank you.

21 (Whereupon, these proceedings were concluded.)
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United States Court of Appeals

FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the
twenty--third day of June
one thousand nine hundred and seventy-seven

Present: HON. WILLIAM H. MULLIGAN
HON. MURRAY I. GURFEIN
HON. ELLSWORTH A. VAN GRAAFEILAND

Circuit Judges,

United States of America,
Plaintiff-Appellee

v.

Jose Nunez, Benito Nunez,
Defendants

Jose Nunez,
Defendant-Appellant

77-1123

Appeal from the United States District Court for the Eastern
District of New York.

This cause came on to be heard on the transcript of record from the
United States District Court for the Eastern District of
New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged,
and decreed that the judgment of said District
Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

by

Arthur Heller
Deputy Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

October 3, 1977

Steven Lloyd Barrett, Esq.
Federal Defender-Appeals Unit
509 U. S. Courthouse-Foley Sq.
New York, NY 10007

RE: Jose Rumez
v. United States
No. 77-5109

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By

Virginia M. Gibson

Assistant Clerk

E